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No. 01-1134

IN THE

Supreme Court of the United States

William D. McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,

Petitioners,

v.

Midwestern Gas Transmission Company and Southern Indiana Gas and Electric Company,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief *Amicus Curiae* of the Interstate Natural Gas Association of America In Opposition to Petition

Arnold B. Podgorsky
Counsel of Record
Jeffrey G. DiSciullo
Michael E. Haddad
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amicus Curiae Interstate Natural Gas Associationof America

Balmar Legal Publishing Services, Falls Church, VA 22042 (703) 289-9000

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Brief *Amicus Curiae* of the Interstate Natural Gas Association of America In Opposition to Petition

This brief *amicus curiae* of the Interstate Natural Gas Association of America (INGAA)[1] is submitted in opposition to the petition for a writ of certiorari filed by William D.

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* and its members are contributing monetarily to the preparation or submission of this brief. The petitioner and respondents have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission (hereinafter "petitioner" or "IURC"). The petition seeks review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in *Midwestern Gas Transmission Co. v. William D. McCarty, et al.*, 270 F.3d 536 (7th Cir. 2001), reproduced at Pet. App. A at 1a-8a.

INTRODUCTION

Amicus INGAA is a trade organization representing interstate natural gas transmission pipeline companies operating in the United States, Canada and Mexico. Through the ownership and operation of over 288,000 miles of pipeline transmission facilities, INGAA's member companies account for over 95 percent of the nation's natural gas deliveries. *Amicus* monitors regulatory, legislative and judicial proceedings of interest to the gas pipeline industry. *Amicus* has elected to participate here, on behalf of its members, given the potentially disruptive, industry-wide implications of IURC's petition.[2]

IURC urges review of the Seventh Circuit's decision, challenging the court's holding that the authority of the Federal Energy Regulatory Commission over the interstate

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[2] An illustrative measure of the potential disruption facing the industry as a result of IURC's petition is the number of Lexis "hits" (Energy library; FERC file) connecting the terms "by-pass" and "distribution or LDC." Literally dozens of cases contain the connected phrases and a cursory review confirms that many involve fact patterns materially indistinguishable from the instant case. *See, e.g., Williams Natural Gas Co.*, 81 FERC ¶ 61,301 (1997); *Algonquin Natural Gas Co.*, 95 FERC ¶ 61,138 (2001); and *Texas Eastern Transmission Corp.*, 85 FERC ¶ 61,324 (1998). All of the cited cases reflect the Commission's consistent treatment of by-pass transportation by an interstate pipeline to direct gas users as "interstate commerce" subject to FERC regulation under the NGA.

transportation of natural gas preempted state regulation. In the court's view, a finding of preemption rendered *Younger v. Harris*[3] abstention principles inapplicable. In addition, and perhaps more fundamentally, the Seventh Circuit recognized that there was no "on-going" state proceeding in which IURC's *Younger* abstention claims were even theoretically cognizable. This is because during the time that the issues regarding preemption were being considered and finally decided by FERC, the IURC had stayed its own proceeding. Thus, as the Seventh Circuit properly recognized:

> [*Younger*] has no application to a case such as this, in which, because of dual federal-state jurisdiction over an activity, here the sale and distribution of natural gas, a federal proceeding (here before the Federal Energy Regulatory Commission) overlapping the state proceeding reaches completion while the state proceeding is still pending at an early stage. There is no affront to the state's prerogative of enforcing its own laws when valid federal law has created a federal forum for the determination of issues that the state proceeding would be able to consider and the proceeding in the federal forum determines those issues before the counterpart state forum is ready to do so.

270 F.3d at 537-38. The Seventh Circuit's decision was unanimous and, as petitioner concedes, reached the same results as three other courts of appeals that considered the same (or similar) issues and facts. Nonetheless, IURC insists that the Seventh Circuit's decision compromises state sovereignty and does so in a manner contrary to this Court's holdings in *New Orleans Public Service, Inc. v. Council of New Orleans*[4] and *Younger*.

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[3] *Younger v. Harris*, 401 U.S. 37 (1971).

[4] *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*").

Amicus INGAA disagrees. Petitioner has, at most, alleged peripheral dicta distinctions between the Seventh Circuit's rationale and the rationale advanced by other circuit courts considering similar preemption and *Younger* abstention claims. Indeed, on the critical issue of whether the Seventh Circuit's holding comports with the holdings of other federal courts, petitioner acknowledges that the Seventh Circuit's decision is in "agreement...[with] three or four [other] circuits" and that courts of appeals deciding the same preemption issues have been "heretofore unanimous." Pet. at 15, n.8.

This concession should end the inquiry. Nothing in the record below suggests that this case presents special or important reasons to justify invocation of this Court's supervisory powers. No basis exists for excavating an area of law that is well-settled, and no compelling grounds have been offered for disturbing the established scheme of federal regulation under which Midwestern's, and countless similar transport arrangements, have been authorized. *Amicus* INGAA therefore urges that the IURC's petition be denied.

STATEMENT OF INTEREST OF *AMICUS* INGAA

The constituent members of *amicus* INGAA are, for the most part, interstate pipeline companies operating within the lower 48 states. The facilities owned by these member companies, and the services they provide, are generally subject to federal regulation under the Natural Gas Act. *See* 15 U.S.C § 717, *et seq.*

For over six decades the member companies of *amicus* have been required to seek FPC/FERC[5] approval in

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[5] The Federal Power Commission was the predecessor agency to the Federal Energy Regulatory Commission. By virtue of the Department of Energy Organization Act, Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), many of the Federal Power Commission's functions were transferred to FERC (with the balance of the functions transferred to the

connection with the construction of facilities used in the transportation of gas in interstate commerce. The reach of federal jurisdiction under NGA's statutory framework is limited only by specific, narrow exemptions, the scope of which has been tested, and retested, in numerous cases heard before the agency, the various circuit courts of appeal and this Court.[6]

IURC's petition seeks to upset the prevailing scheme of federal regulation under the NGA. In the process, the regulatory status of countless existing transportation arrangements, and future transportation transactions, would be cast in doubt. *See* n. 2, *supra*. FERC initiatives designed to promote competition and consumer choices would be jeopardized, if not derailed. The uncertainty, unpredictability and potential disruption invited by IURC's petition compelled INGAA to seek participation *amicus curiae*.

REASONS FOR DENYING THE WRIT

The issues decided by the Seventh Circuit are not novel. They were not resolved in a way that is ambiguous or unclear. They do not beg for this Court's preeminent guidance or reconciliation. To the contrary, this Court (and several courts of appeal) have already considered the same or similar issues and decided them the same way.

Petitioner claims that the opinion below conflicts with *Younger* and *NOPSI*. In support, petitioner completely ignores the holdings of these decisions, relying instead on dicta and a digression into alleged state interests. More

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Department of Energy). *See, e.g., Puget Sound Power & Light*, 1 FERC ¶ 61,059 (1977) (briefly detailing the transfer of functions).

[6] *See, e.g., Williams Natural Gas Co., supra* n.2 (considering scope of "local distribution" exemption); *see also Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1418 (10th Cir. 1992) (same; Court held that local distribution exemption applies to local retail sales, and does not encompass direct transportation by interstate pipeline); and *see infra*, cases discussed n.8.

importantly, petitioner overlooks the chronology of the state and federal administrative proceedings below -- a significant omission given that *Younger* abstention, by definition, requires the existence of an "on-going" state proceeding from which a federal forum may consider abstaining. Here, no such "on-going" state proceeding existed, rendering *Younger*-based arguments inapposite. That the IURC had stayed its state proceeding pending the outcome of the federal proceeding is dispositive of petitioner's *Younger* claims. *See, e.g., Time Warner Cable v. Doyle*, 66 F.3d 867, 874 (7th Cir. 1995) (*Younger* abstention inappropriate where state forum stays its proceedings, pending outcome of federal review of preemption issue).

Furthermore, even accepting *arguendo* that petitioner's *Younger* claims are properly pled, it is well-settled (and petitioner does not dispute) that *Younger* abstention does not apply in cases where the state is presuming to act in a matter(s) that is preempted by federal law. *NOPSI*, 491 U.S. at 366-67. In these circumstances, the state cannot demonstrate a "valid interest" that would meet the threshold condition required under *Younger*. Indeed, where preempted, the state's interest would be manifestly invalid.

The Seventh Circuit's preemption finding is unassailable and preserves decades of regulatory jurisprudence. IURC's claim that the court adopted an equivocal ("seems to us") standard for preemption analysis purposes is incorrect. The Seventh Circuit, citing no fewer than five Supreme Court and circuit court decisions, unequivocally held that the Commission's jurisdiction over interstate transportation of gas, including gas bought from out-of-state sources and delivered directly to Indiana end-users, "is exclusive" and that, consequently, "state regulation is preempted." Pet. App. 4a.

Nonetheless, IURC maintains that the jurisdictional status of the transportation at issue is sufficiently ambiguous to warrant further scrutiny. The lower court's preemption determination, according to IURC, cannot possibly stand

without a more exhaustive inquiry, by the IURC, to determine whether Midwestern's delivery of gas across state lines to Indiana purchasers constitutes exempt "local distribution" (subject to state regulation) or "interstate commerce" (subject to federal regulation).

Again, IURC's arguments are procedurally and substantively flawed. In the first place, FERC is the agency charged with implementing "the statute in question"[7], including determining the scope if its own jurisdiction thereunder. *Federal Power Commission v. Louisiana Power & Light Co., et al.*, 406 U.S. 621, 647 (1972) (recognizing the primary authority of an agency to determine its own jurisdiction and, quoting an earlier Supreme Court decision, observing that with respect to issues involving jurisdictional scope: "[w]hile the agency's decision is not the last word, it must assuredly be the first.") It was therefore entirely appropriate for FERC to proceed with its review and approval of Midwestern's certificate application, and to dispose of the protests filed by the by-passed local distribution company challenging FERC's jurisdiction.[8]

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[7] *I.e.*, the NGA, since it is the NGA that contains the operative terms "local distribution" and "interstate commerce" that, according to IURC, are critical to any preemption analysis. Pet. at 15-16.

[8] Again, it bears emphasizing that FERC's findings were in all respects consistent with every prior "by-pass" case where jurisdictional issues were raised concerning the pipeline's direct connection into an end-use facility. *See, e.g., Cascade Natural Gas Corp.*, 955 F.2d at 1417 (bypass "undoubtedly falls within...grant of jurisdiction"); *Public Utils. Comm'n of State of Cal.*, 900 F.2d 269, 276 (D.C. Cir. 1990) (holding that FERC has jurisdiction over bypass arrangements); *Michigan Consol. Gas Co. v. Panhandle E. Pipeline Co.*, 887 F.2d 1295 (6th Cir. 1989) (holding that local distribution exemption of the NGA did not apply to bypass arrangement and such arrangements are within FERC's jurisdiction); *Michigan Consol. Gas Co. v. FERC*, 883 F.2d 117, 121 (D.C. Cir. 1989) ("[W]e have no difficulty in holding that FERC has jurisdiction over the particular [bypass] arrangement involved in the present controversy."); *and see* n.2, *supra*.

Thus, FERC has already considered the "local distribution" vs. "interstate commerce" argument in the specific context of Midwestern's certificate application and properly concluded that the transportation at issue constituted interstate commerce. *See Midwestern Gas Transmission Co.*, 85 FERC ¶ 61,358 (1998)(n. 14 and accompanying text). *That proceeding, and FERC's jurisdictional determinations, were completed even as the IURC's state proceedings were in a voluntary hold.* With FERC's orders final and no longer subject to review (*i.e.*, by virtue of no party having filed a petition for review in accordance with Section 19(b) of the NGA), there is simply no legitimate procedural vehicle, consistent with collateral estoppel, claim preclusion and preemption principles, by which IURC's state proceeding can be revived.

Substantively, IURC's claims fare no better. Not a single case has been cited to support the proposition that an interstate pipeline, transporting out-of-state volumes to an end-user through an integrated extension of the pipeline's existing system, is engaging in "local distribution" rather than "interstate commerce." But this is not a case where there is merely an absence of affirmative support for petitioner's position. Here, every court that has considered the issue of interstate commerce vs. local distribution has rejected the contention that the integrated, seamless flow of gas deliveries across state lines somehow loses its interstate character (and transforms into local distribution) at some point upstream of the end-use site.

The effect of Sections 87 and 87.5 of the Indiana Code is to establish redundant and unlawful state regulatory requirements governing facilities used for the interstate transportation of gas to end-use consumers in Indiana. Indiana's attempt to regulate in this area tramples the commerce clause of the Constitution, since Congress has entrusted FERC with exclusive jurisdiction over interstate natural gas transportation, including that portion of the interstate transportation that occurs within the state where the

consumer is located. *See* 15 U.S.C. § 717(b). A state statute that conflicts with a federal statute, or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is void. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *see also Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963).

The NGA makes clear that "interstate commerce" is "commerce between any point in a State and any point outside thereof...." 15 U.S.C. § 717(a)(7). Despite the Petitioner's claim that the NGA specifically exempts "local distribution" facilities from federal regulation, *see* 15 U.S.C. § 717(b), this exemption is simply not implicated in the bypass context. The "local distribution" exemption applies to local retail sales. "Congress described the 'local distribution' proviso as 'surplusage' because 'distribution is made only to consumers in connection with sales' and the Commission has no power over direct sales to consumers." *Cascade Natural Gas Corp.*, 955 F.2d at 1418 (*quoting* H.R. Rep. No. 709, 75th Cong., 1st Sess. 3 (1937)). Thus, the exemption upon which Petitioner's case relies reaches no further than the local sale of gas at retail; it does not otherwise abridge FERC's jurisdiction over interstate transportation, which has been consistently defined to include "gas which crosses a state line at any stage of its movement to the ultimate consumer." *California v. Lo-Vaca Gathering Co.,* 379 U.S. 366, 369 (1965); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 163 (1954). As one court noted, the NGA's legislative history (as well as common sense) makes clear that it was not intended "that final delivery to an end user transforms the terminal stage of transportation into distribution." *Public Utils. Comm'n of Cal.*, 900 F.2d at 276 (D.C. Cir. 1990). Every circuit court that has examined the issue has concluded that FERC does indeed have exclusive jurisdiction over bypass arrangements; the "last foot" of the gas's journey is not "distribution" but, rather, still a part of interstate travel. *See* n.8, *supra.*

Having established that Congress intended to grant FERC jurisdiction over interstate transportation bypass arrangements, this Court has held that such grants to FERC are exclusive, not concurrent with any state jurisdiction. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) ("The NGA confers upon FERC *exclusive jurisdiction* over the transportation and sale of natural gas in interstate commerce for resale.") (emphasis added); *see also Public Utils. Comm'n of Cal.*, 900 F.2d at 274 ("[I]f there be Commission jurisdiction over some component of the transaction, it is exclusive over that component."). IURC's petition, which seeks to realign the roles of federal and state regulatory agencies, should be therefore denied.

CONCLUSION

For the reasons set forth herein, *amicus* INGAA respectfully requests that IURC's petition for a writ of certiorari be denied.

Respectfully submitted,

Arnold B. Podgorsky
Counsel of Record
Jeffrey G. DiSciullo
Michael E. Haddad
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amicus Curiae
Interstate Natural Gas
Association Of America

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